No. 12439.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERNEST B. LOPEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Jurisdictional Statement.

(A) On September 6, 1949, appellant filed in the District Court of the United States for the Southern District of California, Central Division, a "Motion to Vacate Judgment and Sentence." Said court had jurisdiction to hear this motion pursuant to Section 2255 of new Title 28 of the U. S. Code, under which it was filed.

(B) Under the provisions of said Section 2255 of new Title 28, this court has jurisdiction of the appeal from the decision of the District Court, of November 7, 1949, denying the said motion to vacate judgment and sentence.

Statement of the Case.

The appellant was prosecuted for a violation of old Title 18, U. S. C., Section 101 (receiving stolen property), and on a second count for violation of old Title 18, U. S. C., Section 88 (conspiracy), in the United States District Court for the Southern District of California, Central Division [T. 2-5]. After a plea of not guilty to each count of the indictment, he was convicted by a jury and sentenced by the court on July 30, 1943, to five years imprisonment in a Federal penitentiary on the first count (18 U. S. C., Section 101), and two years on the second count (18 U. S. C., Section 88), to run consecutively [T. 5-7]. No appeal was taken.

On September 6, 1949, appellant filed a motion to vacate judgment and sentence, under Section 2255 of the new Title 28, U. S. C. [T. 8-12], which was denied by the court on November 11, 1949 [T. 31-36]. Thereafter, on November 28, 1949, "Notice of Appeal" was filed by the appellee [T. 37-39].

Statute.

"28 U. S. C., Sec. 2255 (New). Federal custody; remedies on motion attacking sentence. A prisoner in custody under sentence of a court of the United States claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution, of laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to

collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of *habeas corpus*.

"An application for a writ of *habeas corpus* in be-

half of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

Statement of Facts.

The facts concerning commission of the crimes for which the defendant was convicted are not in issue in this appeal from the order of the District Court denying the appellant's motion to vacate judgment, since the only purpose of the motion to vacate judgment is to determine whether or not the judgment and conviction are void on the face of the record. See cases and authorities hereinafter cited.

Question Involved.

May failure to instruct on the elements of an offense involved in a conspiracy charge be raised in a collateral attack upon judgment and conviction thereof?

ARGUMENT.

At the time of the hearing in the Federal District Court on appellant's motion to vacate judgment and sentence, there appeared to be some basis for contesting it on the ground that since it is a remedy in the nature of the ancient writ of error *coram nobis* (Revisor's Notes, Section 2255, new Title 28, U. S. C.), it must be exercised with reasonable diligence and thus could not, despite the language of Section 2255, "be made at any time." See:

United States v. Moore, 7 Cir., 166 F. 2d 102 (Feb. 27, 1948), cert. den. 334 U. S. 849;

United States v. Rockower, 2 Cir., 171 F. 2d 423 (Dec. 27, 1948).

However subsequent decisions interpreting Section 2255, including that cited in appellant's opening brief (p. 7), establish that a motion thereunder may indeed be made at any time; and except for the requirement it be brought in the trial court, such motion is a more or less exact counterpart of the petition for a writ of *habeas corpus*. See:

Bruno v. United States, C. A. D. C., 180 F. 2d 393 (January 23, 1950);

Barrett v. Hunter, 10 Cir., 180 F. 2d 510 (February 14, 1950);

Meyers v. Welch, 4 Cir., 179 F. 2d 707 (January 14, 1950);

United States v. Sturm, 7 Cir., 180 F. 2d 413 (March 7, 1950);

Gebhart v. Hunter, 89 Fed. Supp. 336 (March 16, 1950).

Thus appellee concedes point one raised and discussed in appellant's brief (pp. 6-7).

Because of the point last made, *i. e.,* that the motion to vacate may be based upon the same general grounds as a petition for a writ of *habeas corpus,* cases concerned with either or both remedies are cited interchangeably herein, as equal authority, in connection with the issues involved.

A Failure to Instruct as to One of Two Substantive Offenses Concerning Which a Conspiracy Is Charged May Not Successfully Be Collaterally Attacked.

Appellant's contentions to the effect that the trial court omitted an instruction or definition concerning the involved offense under Ration Order 5C (App. Op. Br. pp. 7-10) admittedly are sustained by the record herein. Accordingly the sole issue now under consideration is whether or not such omission may successfully be made the basis of a collateral attack upon the judgment. Appellant has cited no case dealing directly with this issue, arising either from a petition for a writ of habeas corpus or a motion to vacate judgment under Section 2255. Even assuming that the court's omission to instruct as aforesaid constituted prejudicial error, it may of course be taken as elementary that a petition for writ of *habeas corpus* (or motion to vacate judgment) may not be substituted for an appeal.

Sunal v. Large, 332 U. S. 174.

One case cited by appellant in his opening brief (p. 15), *Howell v. U. S.,* 3 Cir. 172 F. 2d 213, cert den. 337, 906, (January 12, 1949) seems particularly applicable in this connection. Noting that matters raised by appellant

should have been called to the attention of the trial court and if necessary made the basis of an appeal, the court there said:

> "It is elementary that neither habeas corpus nor motion in the nature of application for writ of error *coram nobis* can be availed of in lieu of writ of error or appeal, to correct errors committed in the course of a trial, *even though such errors relate to constitutional rights.* It is only when there has been the denial of the substance of a fair trial that the validity of the proceedings may be thus collaterally attacked or questioned by motion in the nature of petition for writ of error *coram nobis* or under 28 U. S. C. A. 2255. Birtsch v. United States, 4 Cir., 164 F. 2d 880; Pifer v. United States, 4 Cir., 158 F. 2d 867; Eury v. Huff, 4 Cir., 141 F. 2d 554; Sanderlin v. Smyth, 4 Cir., 138 F. 2d 729; United States v. Brady, 4 Cir., 133 F. 2d 476, 481." (Emphasis supplied.)

See also:

U. S. v. Kranz, 86 Fed. Supp. 776;
Ex parte Atkinson, 84 Fed. Supp. 300.

A most recent case dealing with the same general problem may also be cited. This was *Meyers v. Welch, supra,* 179 F. 2d 707, where the court had under consideration an appeal from an order dismissing a petition for writ of *habeas corpus.* Considering the merits of the petition, the court said, at page 709:

> "In the second place, it is perfectly clear that habeas corpus does not lie to correct mere errors of law in a trial or to try such questions as the sufficiency of the evidence to sustain a conviction *or the refusal to instruct the jury as to the applicable law.*" (Emphasis supplied.)

In these connections, *Sunal v. Large,* 332 U. S. 174, becomes pertinent. There, as here, the petition for writ of habeas corpus did not rely on facts dehors the record and therefore not open to consideration and review on appeal; there, as here, a significant decision rendered subsequent to appellant's conviction contained language appearing to give him new or strengthened rights (332 U. S. 177.) Referring to the rule that a writ of habeas corpus will not be allowed to do service for an appeal, the court said, at page 179:

> "Yet, on the other hand, where the error was flagrant *and there was no other remedy available for its correction,* relief by habeas corpus has sometimes been granted." (Emphasis supplied.)

Referring further to the fact that the exact question presented had in another case been decided subsequent to time for appeal from appellant's conviction, the court went on to say:

> "The case therefore is not one where the law was *changed* after the time for appeal had expired. *Cf.* Warring v. Colpoys, 122 F. 2d 642. It is rather a situation where at the time of the convictions the definitive ruling on the question of law had not crystallized. Of course, if Sunal and Kulick had pursued the appellate course and failed, their cases would be quite different. But since they chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile." (Emphasis supplied.)

The court then added:

> "It is not uncommon after a trial is ended and the time for appeal has passed to discover that *a shift in the law or the impact of a new decision* has given increased relevance to a point made at the trial but not pursued on appeal. *Cf.* Warring v. Colpoys, *supra*. If in such circumstances habeas corpus could be used to correct the error, the writ would become a delayed motion for a new trial, renewed from time to time as the legal climate changed. Error which was not deemed sufficiently adequate to warrant an appeal would acquire new implications. Every error is potentially reversible error; and many rulings of the trial court spell the difference between conviction and acquittal. If defendants who accept the judgment of conviction and do not appeal can later renew their attack on the judgment by habeas corpus, litigation in these criminal cases will be interminable. Wise judicial administration of the federal courts counsels against such course, at least where the error does not trench on any constitutional rights of defendants nor involve the jurisdiction of the trial court." (P. 182; emphasis supplied.)

Thus, assuming further that the omission to instruct upon the provisions of Ration Order 5C touched upon the constitutional rights of the appellant, it may not properly be made the subject to a collateral attack, providing the substance of a fair trial was had by appellant.

The bedrock issue here then is whether or not, on the record now presented, it appears that appellant *was* denied the very substance of a fair trial.

In this connection appellant relies upon certain language in the decision of this court in *Samuel v. United States,*

169 F. 2d 787, which did not involve a collateral attack upon a judgment but which, in view of the language quoted therefrom by appellant (App. Br. p. 15), certainly has "the impact of a new decision."

Significantly, in the *Samuel* case not only was a direct appeal involved, but the appellants had in the trial objected to the erroneous instruction given and had proferred instructions more in accordance with what the court of appeals found to be required; thus they had at all stages of the proceedings preserved the very point they urged on appeal.

In trial of the case at hand appellant was represented by counsel of his own choosing [T. 13], and upon completion of the court's instructions to the jury no exceptions thereto were noted by his counsel [T. 15]. It would seem that the full import of this, and the question whether appellant was denied the very substance of a fair trial, may not be determined without reference to those cases having to do with waiver of constitutional rights by a defendant or his counsel. In *Eury v. Huff*, 4 Cir., 141 F. 2d 554, petitioner sought relief under writ of habeas corpus on the ground that a jury which convicted him was composed of only ten men. The records showed that his counsel had agreed to waive the constitutional requirement of twelve, and proceed with but ten; petitioner claimed he did not know he was entitled to twelve and that the consent he gave thereto was thus vitiated. The court noted that there was nothing to indicate his attorney was lacking in this "elementary knowledge," or that any advantage was taken either of him or the petitioner, and went on to

hold that there had been a valid waiver of the constitutional right to a jury of twelve, and that the judgment of the court based upon the verdict accordingly was not subject to attack. Further, it was held that the question was one that could only have been raised in the original cause, not collaterally by petition for release on habeas corpus.

Likewise in the case of *Baker v. Utecht, et al.,* 8 Cir., 161 F. 2d 304, cert den. 331, U. S. 856, and 332 U. S. 831, reh. den., 332 U. S. 845, there was involved a petition for release by habeas corpus on the ground petitioner had not been given a public trial in violation of his constitutional rights. Said the court, quoting upon the point the Minnesota Supreme Court (p. 305):

> "'* * * By contrast, however, the denial of the right to a public trial (in a part of the proceeding), where the accused enjoys the benefit of competent counsel at every stage of the proceeding, does not *ipso facto* involve a violation of the due process clause and operate as a jurisdictional bar to a valid judgment of conviction. In the latter case, the court is complete and the accused enjoys ample corrective processes through appeal.'"

The Court of Appeals for the Sixth Circuit, in a recent decision, considering an appeal wherein appellant attacked judgment upon the ground that the court erred in failing to instruct upon the offense alleged (Ration Order 5C as amended), went so far as to hold "As to the second contention, apppellant's counsel candidly admits that he did not request the court to charge the jury in the words or

substance of the statute; that the court charged as he requested, and that he took no exception. The charge, taken as a whole, presents no reversible error."

> *Chereton v. U. S.*, 6 Cir., 161 F. 2d 808, 809, cert. den. 332 U. S. 765.

As before emphasized, appellant in his opening brief has cited no case dealing with collateral attack upon a judgment on the ground of failure to instruct as to the elements of the offense involved, and counsel for appellee has been able to fine none other than those above cited, and that of *Kenion v. Gill,* C. A. D. C., 155 F. 2d 176. There, on appeal from denial of a writ of habeas corpus, appellant contended that the instructions by the judge to the jury were so inadequate as to deny him due process of law and that by such denial the court had lost jurisdiction to enter judgment. Recognizing that "it is reversible error for the trial court to fail to define the various crimes involved in the indictment and to fail to define the elements of each, to the extent necessary to permit the jury to apply the law to the facts," the court went on to say that the particular instructions, on careful examination of the entire record, were not open to successful collateral attack by habeas corpus proceedings. In the course of its opinion it stated, at page 179,

> "It is also established that the writ may be used in those exceptional cases where the conviction has been in disregard of the Constitutional rights of the accused *and* where the writ is the *only effective means of preserving the rights of the accused; as where the facts relied on are dehors the record, and their effect on the judgment is not open to consideration and review on appeal.*" (P. 179; emphasis supplied.)

The court noted too that no exception to the contested instruction had been made by counsel during trial and that there had been no further request as to instructions upon the offense involved.

The entire subject of the trial court's duty to explain and define the offense charged in a criminal prosecution is discussed in a lengthy and complete annotation in 169 A. L. R. 305; this was an annotation to the decision of this court in *Morris v. U. S.,* 156 F. 2d 525, 169 A. L. R. 305. Upon consideration of the authority herein cited, it will appear to the court that there is indeed a contrast between situations discussed in such annotation and that of the appellant in this matter. The difference here of course lies in the facts that appellant was represented by counsel of his own choosing; that in the trial court no objection was made to the instructions as given; and that appellant now seeks collaterally to attack the judgment herein by virtue of the impact of certain language contained in a recent decision, several years subsequent to his conviction (*Samuel v. U. S., supra,* 169 F. 2d 787). Further the instructions which were actually given must be considered in the light of all circumstances attendant upon the trial (see *Kenion v. Gill, supra,* 155 F. 2d 176); and in any event the appellant has the burden of showing conclusively that he is entitled to the relief sought. (See *Michener v. Johnston,* 9 Cir., 141 F. 2d 171.)

The court may well consider, even in the absence of a showing in the record herein to such effect, the times during which indictment was brought and trial had in this